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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1182

UNITED AIR LINES, INC.,
Petitioner,

vs.

KATHLEEN C. INDA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petitioner United Air Lines, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Kathleen C. Inda* and *Kathleen F. Moritz v. United Air Lines, Inc.*, No. 75-1527 and 75-2174 below.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Inda v. United Air Lines, Inc.*, 565 F.2d 554 (9th Cir. 1977), and is set forth in the Appendix A attached hereto. The opinion of the

District Court is reported at 405 F.Supp. 426 (N.D.Cal. 1975), and is set forth in Appendix B attached.

JURISDICTION

The judgment of the Court of Appeals was entered on November 28, 1977.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* and 28 U.S.C. § 1343(3).

QUESTION PRESENTED

Whether Section 14 of the Equal Employment Opportunity Act of 1972 retroactively renders timely a previously untimely charge of discrimination where the alleged act of discrimination occurred more than three and one half (3½) years prior to the effective date of the 1972 amendments to Title VII; and, if Section 14 is given such effect, whether petitioner is deprived of its property contrary to the due process clause of the Fifth Amendment.

STATUTES INVOLVED

Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113, provides:

> "The amendments made by this Act to Section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 241, 260, 42 U.S.C. § 2000e-5(d), provided in pertinent part:

> "A charge under subsection(a) shall be filed within ninety days after the alleged unlawful employment practice occurred. . . ."

Section 706(e) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, 42 U.S.C. § 2000e-5(e), provides in pertinent part:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . ."

STATEMENT OF THE CASE

Respondent Kathleen C. Inda, to whom this petition is limited, was employed by United Air Lines, Inc. (United) as a flight attendant from December 29, 1965 to June 15, 1968 when she was forced to resign because she planned to be married on June 29, 1968.

At the time of Inda's resignation United maintained a policy of refusing to employ or continue in employment female flight attendants who were or became married.[1]

On November 18, 1968, some 156 days after her resignation, Inda filed charges of sex discrimination with the EEOC against United and the Airline Pilots Association.

At the time Inda's charges were filed, Section 706(d) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(d), provided that charges of discrimination must be filed "within ninety days after the alleged unlawful employment practice occurred." This was the law until March 24, 1972 when Section 706 was amended by Congress to require that all charges be filed "within one hundred and eighty days after the alleged unlawful employment practice occurred."

On December 22, 1970, the EEOC issued a decision as to Inda's charges concluding that there was reasonable cause to believe that United had engaged in unlawful employment practices.

On October 16, 1972, the EEOC issued a notice of right to sue to Inda.

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1. Although it was subsequently decided that such a policy violated Title VII, *Sprogis v. United Air Lines,* 444 F.2d 1194 (7th Cir. 1971), *cert. denied,* 404 U.S. 991, Inda was not a party to that case.

And then, on October 18, 1972, respondent Inda filed a complaint against United and the Airline Pilots Association in the United States District Court for the Northern District of California alleging sex discrimination.[2]

Before answering the complaint, United filed a motion seeking dismissal of the action on the grounds that Inda was time barred because she had failed to file her charge of discrimination within ninety days as the statute required. That motion was denied without opinion.

Trial followed and on January 30, 1975 the District Court entered judgment against United. Inda was awarded $41,917.00 in back pay and reinstated as a flight attendant. See Appendix B.

Appeal was taken to the Ninth Circuit.

On November 28, 1977 the Ninth Circuit affirmed the District Court's judgment as to Inda. In affirming that judgment the Ninth Circuit held that Inda's charge was timely filed even though it had been filed one hundred and fifty six (156) days after her June 15, 1968 resignation. The Court reasoned that Section 14 of the Equal Employment Opportunity Act of 1972 made the new one hundred and eighty (180) day limitation period retroactively applicable to all charges of discrimination on file with the EEOC on March 24, 1972.[3] In short, the Ninth Circuit has held that, even though Inda's charge was untimely when filed on November 18, 1968, and was untimely for the whole of the years 1969, 1970, and 1971, it was rendered timely on March 24, 1972 by act of Congress. *Inda,* supra, 565 F.2d at 560-61; Appendix A, pp. 10, 11. As of March 24, 1972, it will be seen that 1,378 days had elapsed since the date of the forced resignation (June 15, 1968).

2. The Airline Pilots Association was subsequently dismissed.

3. The date of enactment of the Equal Employment Opportunity Act of 1972.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Ninth Circuit Below Conflicts in Principle With the Decision of this Court in United Air Lines v. Evans, 431 U.S. 553 (1977).

Last term this Court addressed itself to the question of whether a United flight attendant who also had been forced to resign in 1968 because of United's no-marriage policy had filed timely charges of discrimination in February 1973 concerning denial of seniority for time accrued during her previous employment with United. *United Air Lines v. Evans,* 431 U.S. 553 (1977).

In affirming the dismissal of that action as untimely, this Court noted:

> ". . . United was entitled to treat that past act [the forced resignation of Evans] as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences."

431 U.S. at 558.

In the present action, after the passage of 90 days respondent Inda had failed to file any charge of discrimination. Thus, under *Evans,* United was entitled to treat the alleged act of discrimination as "lawful." Under *Evans,* because Inda's forced resignation was not made the basis of a timely charge, it was "the legal equivalent of a discriminatory act which occurred before the statute was passed." It was "merely an unfortunate event in history which has no present legal consequences."

The Ninth Circuit's opinion finding that Inda's charge was timely conflicts in principle with the decision of this Court in *Evans.*

2. The Decision of the Ninth Circuit Below Has So Far Departed from Applicable Decisions of This Court as to Require Reversal.

In the light of this Court's recent decision in *Evans,* supra, the Ninth Circuit's holding is in conflict with this Court's holding in *William Danzer & Co. v. Gulf & Ship Island R.Co.,* 268 U.S. 633 (1924).

The applicability of *Danzer* to the 1972 amendments of Title VII was most recently addressed by this Court in *Electrical Workers Local 790 v. Robbins & Myers, Inc.,* 429 U.S. 229, 243 (1976).

In *Electrical Workers,* supra, 429 U.S. at 243, this Court held that in enacting Section 14 of the Equal Employment Opportunity Act of 1972 Congress intended the 180 day limitation period to apply to all charges on file with the EEOC on the effective date of the 1972 amendments *only* so long as the charge "alleged a discriminatory occurrence within 180 days of the enactment of the Act."

Under the facts of *Electrical Workers,* supra, 429 U.S. at 243, this Court concluded that petitioners there gave *Danzer* an overly broad reading in asserting that it stood as a bar to *any* retroactive application of the 180 day limitation period by Congress.

But, *Electrical Workers,* supra, was decided before *Evans* and it did not decide the question raised by this petition. This Court limited its decision in *Electrical Workers* to the facts then before it; it did not decide:

> ". . . whether the enlarged limitations period also redounds to the benefit of persons who filed a charge more than 90, but less than 180, days from the date of the alleged 'occurrence,' where the 180 days had run prior to March 24, 1972."

429 U.S. at 243, n. 17. Here, as has been seen, the "occurrence" took place many more than 180 days prior to March 24, 1972.

In deciding this quesiton the Ninth Circuit has held:

> "The question so reserved by the Court is the one before us: whether *Electrical Workers* must be held to its facts, i.e., whether the fact that the discriminatory action occurred within 180 days of the enactment of the Act is crucial. We hold that it is not."

565 F.2d at 560-61; Appendix A, p. 10. In other words, the Court below held that under the 1972 Act a change was timely even though more than 180 days had elapsed as of March 24, 1972 following the unlawful discrimination.

By failing to limit *Electrical Workers* to its facts, the Ninth Circuit has misapplied the pertinent provisions of the 1972 Act and has sanctioned the taking of United's property without due process of law.

It was the passage of time which caused back pay liability to accrue against United. In 1968, after Inda failed to file timely charges, all back pay liability had been cut off, for the act of discrimination had been rendered "lawful;" it was as if the act of discrimination had occurred before the statute was passed. *Evans,* supra, 431 U.S. at 558.

If the decision below is allowed to stand, the act of discrimination which had been rendered lawful and had no legal consequences for more than three years is suddenly and retroactively rendered unlawful with enormous legal consequence. Such a holding is contrary to the Court's teaching in *Danzer.*

The statute involved in *Danzer,* supra, the Interstate Commerce Act, like Title VII, contained a limitation period which was an integral part of the liability, it did not merely involve a matter of remedy. And, as here, there was subsequent legislation in *Danzer* which changed the limitation period.

In sustaining the dismissal of a complaint for $307.15 in damages and interest, the *Danzer* court held that:

> "It is settled by the decisions of this court that the lapse of time not only barred the remedy but also destroyed the liability of defendant to plaintiff. [citation omitted.] On the expiration of the two-year period, it was as if liability had never existed."

268 U.S. at 636.

The decision of this Court in *Evans* has established that Title VII's limitation period not only bars the remedy (back pay and reinstatement) but also destroys the liability of defendant to plaintiff; it establishes that upon expiration of the limitation period, it is as if the liability never existed. To quote again from *Evans,* supra, 431 U.S. at 558:

> ". . . United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by § 706(d). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed."

And nothing in the *Electrical Workers* case saves Inda from the application of this salutary principle.

3. The Decision of the Ninth Circuit Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The question raised in this petition was left unanswered by this Court in *Electrical Workers,* supra, 429 U.S. at 243, n. 17.

There have now been three courts which have addressed this question; the Ninth Circuit below, the Northern District of Illinois in *Crook v. Penn. Central Transportation Co.,* 427 F. Supp. 956 (N.D.Ill. 1977) and the Eastern District of Pennsylvania in *Dickerson v. U.S. Steel Corp.,* 439 F. Supp. 55, 69 n. 11 (E.D.Pa. 1977). Each of these courts has erroneously concluded that the 180 day limitation period is retroactively applicable to *all* charges on file with the EEOC on March 24, 1972. There is no reason

to believe that more cases will not follow. Without proper guidance from this Court on this threshold jurisdictional question there will be much unnecessary litigation.

CONCLUSION

We respectfully submit that the petition should be granted.

Dated: San Francisco, California, February 24, 1978

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(Appendices Follow)

Appendix A

United States Court of Appeals, Ninth Circuit

Nos. 75-1527 and 75-2174

Kathleen C. INDA, and Kathleen F. Moritz,
Plaintiffs-Appellees,

v.

UNITED AIR LINES, INC.
Defendant-Appellant.

Kathleen C. INDA, and Kathleen F. Moritz,
Plaintiffs-Cross Appellants,

v.

UNITED AIR LINES, INC.,
Defendant-Cross Appellee.

Nov. 28, 1977

On Appeal from the United States District Court for the Northern District of California.

Before MERRILL and CHOY, Circuit Judges, and BONSAL,* District Judge.

MERRILL, Circuit Judge.

On October 18, 1972, Kathleen Inda and Kathleen Moritz filed this suit in the District Court for the Northern District of California, alleging that United Air Lines and the Air Line Pilots Association (ALPA) had discriminated against them on the basis of their sex in violation of Title VII of the Civil Rights Act of

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*Honorable Dudley B. Bonsal, Senior United States District Judge for the Southern District of New York, sitting by designation.

1964, 42 U.S.C. §§ 2000e *et seq.* and § 1 of the Civil Rights Act of 1870, 42 U.S.C. § 1981. The alleged discrimination arose out of United's "no-marriage" rule which required female, but not male, flight cabin attendants to be single and to resign immediately or be terminated upon marriage.

The suit was filed by Inda and Moritz on behalf of themselves and all other women who, because of the no-marriage rule, had either been denied initial employment as stewardesses or had been forced to resign such positions. They sought a permanent injunction restraining United from engaging in such discriminatory employment practices and requiring United to reinstate with full seniority and benefits (including back pay) the named plaintiffs and all members of the class who had been forced to resign or who had been terminated because of the rule.

On January 8, 1973, United filed a Rule 12(b) motion to dismiss the action on the ground that plaintiffs had failed to file timely charges with the Equal Employment Opportunity Commission (EEOC) and that the district court thus was without jurisdiction. The District court denied this motion.

On April 8, 1974, plaintiffs filed a Rule 23 motion for a preliminary determination that their action be permitted to go forward as a class action. The district court also denied this motion.

The § 1981 claim was dismissed by an order entered by the district court on July 11, 1974. The action against ALPA was dismissed by stipulation on November 18, 1974.

A court trial was then held on December 16, 1974, on the Title VII issue of whether Inda and Moritz had been forced to resign under the no-marriage rule or had voluntarily resigned. The district court found the plaintiffs would have continued to work but for the no-marriage rule. Hearings were subsequently held on the questions of damages and attorney fees. On January 30, 1975, the district court filed its findings of fact and conclusions of

law. Judgment was rendered in favor of Inda in the sum of $41,917, and in favor of Moritz in the sum of $57,823, both sums plus interest. United was also ordered to reinstate both plaintiffs with full seniority from the dates on which they originally had been hired and to pay plaintiffs' attorneys' fees in the amount of $38,066.42.

Two major issues are presented on appeal. United's principal ground on appeal is that the plaintiffs did not file timely charges with the EEOC, a necessary precondition to suit by a plaintiff under Title VII. Inda and Moritz appeal from the denial of their motion for an order that the case proceed as a class action.

APPEAL OF UNITED; TIMELY FILING OF CLAIMS WITH EEOC

Inda worked for United as a stewardess from December 29, 1965, to June 15, 1968, when she submitted her resignation because of her plan to marry. After resigning she was employed in a clerical ground position by United, from August, 1968, through August, 1969. Moritz worked for United as a stewardess from February 9, 1966, until March 5, 1968, when she resigned because of her plan to marry.

Both plaintiffs testified that they would not have resigned had the no-marriage rule not required it. Plaintiffs also testified that they had resigned because their supervisors had told them that if they did not resign they would be fired; and that under its hiring policy United would not rehire one who had been fired; and that if plaintiffs resigned and the rule requiring termination should be abandoned, they would have preference in being re-employed. Two of United's supervisors confirmed that such advice had been given.[1] Neither Inda nor Moritz filed a grievance with ALPA or

1. Cathy Coane stated: "I really believed that * * * if the rule were to be changed they would have a better chance to be re-employed." Sue Halstead Profilet stated: "We sincerely felt that when this policy would change that these girls would certainly be allowed to return to their jobs."

a complaint with the EEOC or a state agency at the time of their forced resignation.

On November 7, 1968, eight months after Moritz's and five months after Inda's resignation, following negotiations with ALPA acting on behalf of United stewardesses, United adopted a new policy to the effect that marriage would not disqualify a stewardess from continuing to act as such.[2]

Under the new policy United still would not initially employ married women. Nor was the policy made to apply to those who had resigned and had not filed grievances or complaints. Instead of favoring those who had accepted company policy by openly disclosing their plans to marry and resigning, the new policy favored those who had chosen not to disclose the fact of marriage but to submit to being fired when that fact was discovered and who had then filed grievances or charges. Thus, the supervisors' representations on which Inda and Moritz had relied, despite the fact that they were given in all good faith, proved out to be false.

On November 14, 1968, one week after United had adopted this new policy, Moritz sought employment with United as a stewardess and Inda sought a transfer from her ground job with United to a position as a stewardess. Both were denied. Complaints were filed with the EEOC by Moritz on November 13, 1968, and by Inda on November 18, 1968.

Section 706(d) of the Civil Rights Act of 1964 (now 42 U.S.C. § 2000e-5(e)) at the time the charges were filed required the

2. The letter agreement between ALPA and United stated in part:
"The Company agrees that marriage will not disqualify a Stewardess from continuing in the employ of the Company as a Stewardess * * *.
All Stewardesses who have been terminated by the Company because of marriage and have filed a valid grievance protesting such policy, or who have as of this date filed a valid complaint before the Equal Employment Opportunity Commission or State Agencies, will be offered the opportunity to return to active Stewardess service."

aggrieved person to file a charge with the Commission within 90 days after the alleged unlawful employment practice had occurred. Neither Inda nor Moritz met this requirement and United contends that their claims accordingly are barred.

Tolling of the Ninety Day Statute

Appellants and the EEOC as amicus curiae have argued that the claims of both appellants were timely because other United employees had already filed complaints with the EEOC challenging the same policy of United. They contend that the complaints of Mary Sprogis, filed with the EEOC in August, 1966, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991, 92 S.Ct. 536, 30 L.Ed.2d 543 (1971), and Carol Romasanta, filed in 1967, *Romasanta v. United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976), *aff'd sub nom., United Airlines, Inc. v. McDonald*, ... U.S. ....., 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977), made the filing of additional complaints by other aggrieved United stewardesses unnecessary and redundant. For support of this contention appellants and the Commission rely on language contained in *Albemarle Paper Co. v. Moody* 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). There the Supreme Court held that back pay could be awarded on a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members. From this holding, appellants reason, either one of two results rationally follows: either (1) one need no longer file a charge with the EEOC in order to obtain a right to sue in one's own behalf once someone else has filed a charge based on the same violation; or (2) the time within which one must file an EEOC charge is tolled by the filing of such a charge by someone else.

We cannot agree that either result rationally flows from *Albemarle*.

[1] Title VII painstakingly spells out the procedure by which one obtains a right to sue on his own behalf and the times within which certain steps must be taken. In *United Air Lines v. Evans,* ..... U.S. ....., 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), the Supreme Court strictly enforced these provisions, holding that Evans' claim was barred by her failure to file a timely charge with the EEOC. *Albemarle* was not dealing with a right to sue; it dealt with class membership in a class action. It held only that relief can be awarded on a class basis to those who have suffered the same violation of Title VII, and that compliance with the procedural requirements by which one obtains a right to sue under Title VII is not essential to class membership. 422 U.S. at 414 n. 8, 95 S.Ct. 2362. In so holding the Court noted that decisions of courts of appeals were uniformly to this effect prior to the amendment of the Act in 1972, and that legislative history indicated congressional ratification of this view through enactment of the 1972 amendments. *Id.* Nothing in the amendments remotely suggests that Congress intended to eliminate the concept of a right to sue or to abolish the procedures by which one obtains such a right.

Nor does it follow from *Albemarle* that the filing of a charge by one person operates to toll the time within which another person must file such a charge if a right to sue is to be obtained. *Albemarle* did not involve a tolling of the 90 day statute of limitations. The question was not one of timely filing; the question was whether a charge need be filed at all in order to enjoy membership in a class.

Some courts have suggested that the filing of a charge by one employee should toll the statute for all others who, at the time of the filing, could themselves have filed for the same violation, and that the statute should not again commence to run until the Commission had completed its efforts to mediate the dispute and had issued a right to sue letter or had dismissed the charge. *E.g., United States v. Georgia Power Co.,* 474 F.2d 906, 925 (5th Cir. 1973).

The analogy often relied on is *American Pipe & Construction Co. v. Utah,* 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). That case was an antitrust action where no analogous administrative proceeding precedes the suit. The tolling was of the time within which one must act on his own behalf in bringing suit for antitrust violation. The case held that a class action brought for antitrust violation tolls the statute as to all members of the class until the class is denied by the court and the class members are thus ejected from the suit. 414 U.S. at 561, 94 S.Ct. 756. The case proceeded on the theory that if one has a certain time within which to take certain action, action of that sort taken on his behalf by another within the time limit is timely taken and effectively protects one against the running of the statute until the representation is nullified by court action. The Court noted that by filing the class action the representative "notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." 414 U.S. at 555, 94 S.Ct. at 767.

Here, however, an employee, by filing an EEOC charge on his own behalf, is not acting on behalf of a class. As in the case of Sprogis (who sued only on her own behalf, *Sprogis v. United Air Lines, Inc., supra,* 444 F.2d 1194), he may never act on behalf of a class. Until he does so others cannot say that he has done for them that which is required of them by law.

[2] The result is that timely filing of an EEOC charge is not a necessary condition to the obtaining of relief by one as a member of a class in whose behalf suit has been brought. However, if one brings suit on his own behalf, or as named plaintiff on behalf of a class, he must have secured a right to sue by timely following the procedures set forth in Title VII.

It does not follow that EEOC charges cannot be filed on behalf of a class. Title VII provides for such filing. Section 2000e-5(b)

provides that a charge can be "filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." Section 2000e-5(f)(1) provides that if the charge was filed by a member of the Commission any person whom the charge alleges was aggrieved by the unlawful employment practice should be notified of his right to bring a civil action. The EEOC Regulations provide:

> "To come within the purview of this section an individual may either be specifically designated by name or be among the class of persons aggrieved by the practices complained of in the charge."

29 C.F.R. § 1601.25c(a). In cases involving Commissioner charges, "where the Commission has found reasonable cause but has been unable to obtain voluntary compliance with title VII, the Commission shall so notify the respondent and all identifiable members of the class." 29 C.F.R. § 1601.25c(c). This notice informs class members of their right to demand that a "Notice-of-Right-to-Sue" issue and to bring a civil suit. *Id.*

[3] Thus, when a member of the Commission files on behalf of others, they can obtain their rights to sue without having filed in their own behalf. With such provisions in the Act we see no need to provide for additional class representation through judicial improvisation.

[4] We conclude that the 90 day statute was not tolled by the filing of charges by others than Inda or Moritz.

Other Timely Filing Issues

Other factors enter into the question of timely filing, however. In 1972, Title VII was amended to extend the 90 day period to 180 days. 86 Stat. 103 (Mar. 24, 1972), 42 U.S.C. § 2000e-5(e). Section 14 of the amendments, 86 Stat. 113, provides:

> "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

Inda's charge filed November 18, 1968, as to a violation occurring on June 15, 1968, was filed within 180 days. Moritz's charge, filed November 13, 1968, as to a violation occurring March 5, 1968, was not filed within 180 days. It was, however, filed within 90 days of the denial of employment on November 14, 1968, and was timely if such denial can be regarded as a separate violation, independent of the earlier one.

United's contention that the charges were not timely filed thus presents different issues in the two cases. As to Inda, the question is whether the charge filed November 18, 1968, was "pending with the Commission on [March 24, 1972] the date of enactment of the Act." As to Moritz, the question is whether the denial of employment on November 14, 1968, was itself a separate violation independent of the earlier one or was simply a reassertion of the time-barred earlier violation.

(a) *Inda's Charge*

Electrical Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 299, 97 S.Ct. 441, 50 L.Ed.2d 427 (1976), considered the meaning of the language, "pending with the Commission" as used in the 1972 Act. In that case a charge had been filed more than 90 days but less than 180 days after the charged violation. The employer contended that since the charge was untimely when filed it could not have been pending with the Commission when the Act was enacted. The court rejected this contention. It stated:

> "This reading of 'pending'—confining it to charges still before the Commission *and* timely when filed—is not the only possible meaning of the word, is largely rebutted by the legislative history, and renders the language of § 14 virtually meaningless insofar as the enlarged limitation period is con-

cerned. Since Congress also applied the enlarged limitations period to charges, whether or not untimely on March 24, 'filed thereafter,' we should not presume Congress created this odd hiatus in retroactivity suggested by *Robbins & Myers* unless congressional intent to do so was conveyed by language more precise than 'pending,' cf. *Love v. Pullman Co.*, 404 U.S. 522, [92 S.Ct. 616, 30 L.Ed.2d 679] (1972). 'Pending' is simply not a term of art that unambiguously carries with it a meaning precisely suited for this situation; equally logical, for example, would be an interpretation that read 'pending' to mean 'filed and not yet rejected,' cf. Committee Legis. Hist., *supra*, n. 16, at 1851."

429 U.S. at 242-43, 97 S.Ct. at 450.

The precise holding of the Court in *Electrical Workers* was as follows:

"We hold that Congress intended the 180-day period to be applicable to charges such as that filed by Guy, where the charge was filed with the EEOC prior to March 24, 1972, and alleged a discriminatory occurrence within 180 days of the enactment of the Act."

Id. at 243, 97 S.Ct. at 450. The Court added, in note 17:

"Accordingly, we need not decide whether the enlarged limitations period also redounds to the benefit of persons who filed a charge more than 90, but less than 180, days from the date of the alleged 'occurrence,' where the 180 days had run prior to March 24, 1972."

Id.

The question so reserved by the Court is the one before us: Whether *Electrical Workers* must be held to its facts, *i. e.*, whether the fact that the discriminatory action occurred within 180 days of the enactment of the Act is crucial. We hold that it is not. *Accord, Crook v. Penn Central Transportation Co.*, 427 F.Supp. 956, 958-59 (N.D.Ill.1977); *Dickerson v. U.S. Steel Co.*, —— F.Supp. ——, —— n. 11 (E.D.Pa. 1977). If the charge was, on the date of enactment, on file with the Commission, and if final action had not yet been taken by the Commission with respect to the charge, the charge was pending in the sense in which that term is commonly used. It is that sense that we have attributed to Congress.

[5] Inda filed her charge against United with the Commission on November 18, 1968. On December 22, 1970, the Commission issued a decision concluding that there was reasonable cause to believe that United had engaged in unlawful employment practices. The issuance of that decision did not terminate the jurisdiction of the Commission on the charge, but led to a period during which there were efforts to obtain conciliation and voluntary compliance. *See, Occidental Life Ins. Co. v. E.E.O.C.*, —— U.S. ——, ——-——, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977); *Cunningham v. Litton Industries*, 413 F.2d 887, 890 (9th Cir. 1969). On October 16, 1972, the Commission issued a notice of right to sue to Inda. Under the test set forth above, Inda's charge was still pending before the Commission on March 24, 1972, when the amendments were enacted.

We conclude that Inda's charge was timely filed as to the June 15, 1968, violation and that judgment of the district court should be affirmed in that respect.

(b) *Moritz's Charge*

As we have noted, Moritz did not file her charge with the EEOC within 180 days of her discharge and her action was not timely under our interpretation of the 1972 amendments. The question as to this charge, therefore, is whether the denial of employment on November 14, 1968, constituted a separate and independent violation which, standing alone, would support a charge of unfair employment practice.

In *Collins v. United Air Lines, Inc.*, 514 F.2d 594 (9th Cir. 1975), this court dealt with the question whether denial of rein-

statement is an offense separate from the original discharge. That case involved the same employer and the same no-marriage rule involved here. That case also involved an involuntary resignation in the face of the rule, and a rejection of an application for reinstatement made after the 1968 change in company policy. We held the application to be untimely, rejecting the appellant's contentions in the alternative that the initial violation was a continuing one and that the denial of reinstatement was an independent violation. We quoted from *NLRB v. Textile Machine Works,* 214 F.2d 929, 932 (3d Cir. 1954):

> "'A discharged employee who seeks to be *reinstated* is really litigating the unfairness of his original discharge because only if the original discharge was discriminatory is he entitled to be reinstated as if he had never ceased working for the employer.'"

514 F.2d at 596-97.

Collins was, however, quite a different case factually from this one. Collins had resigned in May, 1967. Four-and-one-half years later, in October, 1971 (three years after the 1968 change in company policy), she applied for reinstatement "to full status as stewardess, with full seniority and back pay." After being denied reemployment, she promptly filed charges with EEOC in November, 1971. Nothing is said in the opinion as to any company inducement to secure resignation, nor as to any circumstances that would render the initial violation a continuing one or the denial of reinstatement an independent violation. One can readily infer, in absence of some explanation for the delay, that the application for reinstatement was made for the sole purpose of serving as a sham basis for a tardy EEOC charge directed at the initial resignation.

[6] Our case is distinguishable from *Collins*. Here plaintiffs acted with exemplary promptness. Only one week elapsed (as against Collins' delay of three years) after announcement of the

rule change before both plaintiffs applied for re-employment. Here new elements of unfairness, not existing at the time of the original violation, attached to denial of re-employment, and it cannot be said, as it was in *NLRB v. Textile Machine Works, supra,* that the discrimination attaching to the original discharge was the only basis for reinstatement. While no fault could be said to have attached to the making of good faith representations as to future hiring preferment, inequity did arise from United's failure to protect those who had relied upon the company representations. Under these circumstances equitable principles analogous to those of estoppel demand that United honor the representations relied on by plaintiffs to their detriment. Failure to do so renders the denial of re-employment an independent breach of duty, sharing with the original termination its nature as a discrimination on the basis of sex and thus a violation of the Act, as to which violation the EEOC charges were timely filed by Moritz.

The substance of the representation to which we hold United was that should the no-marriage rule be terminated those stewardesses who had, because of the rule, resigned would be re-employed. It was the company's failure to re-employ Moritz on November 14, 1968, that constituted the violation in her case. The relief to which she is entitled must then be directed to that violation rather than to the earlier time-barred violation. The district court awarded back pay to the earlier violation. This we hold to be error. The judgment in Moritz's favor should be modified to award back pay to the November 14, 1968, violation and adjust seniority accordingly.

Mitigation of Damages; Attorney Fees

[7] Attacking the damages awarded to both appellees as excessive, United contends that there was no substantial evidence that either Inda or Moritz had made reasonable efforts to mitigate

damages by diligently pursuing other employment.[3] The record contains credible testimony as to the efforts made. The question is as to the degree of diligence that should be required and the promptness with which plaintiffs should be required to have abandoned efforts to secure employment in their chosen field and to have sought employment in other fields. We note again that only five months elapsed in the case of Inda, and eight months in the case of Moritz, between resignation and application for re-employment. In our judgment the court's findings in these respects were not clearly erroneous.

We find no merit in United's contention that the attorneys' fees awarded Inda and Moritz were excessive.

APPEAL OF INDA AND MORITZ; PROPRIETY OF CLASS ACTION

[8] In denying appellants' motion for an order that the action continue as a class action under Rule 23, Federal Rules of Civil Procedure, the district court entered an order as follows:

> "Plaintiff's Motion to Determine Class and Motion That The Action Continue As A Class Action came on for hearing on May 17, 1974, and the Court having heard the arguments of counsel, having read the memoranda on file, and being fully advised in the premises now ORDERS that Plaintiffs' Motion to Determine Class be, and it hereby is, denied; and FURTHER ORDERS that Plaintiffs' Motion That The Action Continue As a Class Action be, and it hereby is, denied."

From this order we have no way of knowing the ground upon which the court acted and thus no way of reviewing the propriety of that action.

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3. 42 U.S.C. § 2000e-5(g) provides in part:
"Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

In *Price v. Lucky Stores, Inc.*, 501 F.2d 1177, 1179 (9th Cir. 1974), we held that a trial court, "in determining whether or not the case should proceed as a class suit, should make certain findings as to the Rule's provisions and their application to the case at bar." In the case before us the trial court should, at the least, state the reasons for denial with such specificity that findings can be supplied by implication.

United argues that *Price* was decided after the district court's decision denying plaintiffs' motion to permit their action to proceed as a class action and that *Price* should not be given retroactive effect. But in *Price* we noted that the need for findings by the trial court was implicit in prior cases and Rule 23 itself. *Id.* at 1170. Thus, the holding of *Price* is applicable to this case. *See generally United States v. Bowen*, 500 F.2d 960, 975 (9th Cir. 1974) (Part II, Wallace, J.) *aff'd* 422 U.S. 916, 95 S.Ct. 2569, 45 L.Ed.2d 641 (1975).

United points out that in *Price* there was no record other than the complaint, answer and motion to dismiss; it asserts that here there is such a record and that from examination of it grounds for denial of class action status clearly appear. Thus, we are asked not to determine whether a specific basis for denial finds support in the record, but to determine in the first instance whether or not existence of a ground is to be found in the record. In our judgment basis for denial does not appear from the record with the clarity United attributes to it. For us to make the necessary determination we would have to deal with subsidiary questions requiring resolution of factual disputes or exercise of discretion—judicial actions which are not appropriately a part of the appellate function.

We conclude that the order denying class action status must be vacated and the matter remanded for entry of a sufficiently explicit order. The district court is at liberty, within its discretion, to

entertain further hearing on the question. Much has happened since the order in question was entered. The Supreme Court has handed down decisions involving the same no-marriage rule and related issues and may have clarified the law in some relevant respects.[4] A class, possibly with the same members, has been certified in another action against United, *Romasanta v. United Airlines, Inc., supra,* 587 F.2d at 919-20. More information respecting the proposed class may have become available, and a redefinition of the class may have become appropriate. We make no suggestions in any such respects, but offer the district court a free hand in extending or limiting the area of inquiry and in entertaining motions with respect to it.

Upon the appeal of United, judgment in favor of Inda is affirmed; judgment in favor of Moritz is vacated and the matter remanded with instructions to modify the award of back pay to run from November 14, 1968, and to adjust seniority to conform with re-employment as of that date. Upon the appeal of Inda and Moritz, the order denying class status is vacated and the matter remanded for further proceedings. Costs are awarded to Inda and Moritz.

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4. *United Air Lines, Inc. v. McDonald,* — U.S. —, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977); *United Air Lines, Inc. v. Evans,* — U.S. —, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

Appendix B

Kathleen C. INDA and
Kathleen F. Moritz, Plaintiffs,

v.

UNITED AIR LINES, INC. and Air Line Pilots Association, International,

Defendants.

No. C-72-1890 SW.

United States District Court,
N. D. California.

Jan. 30, 1975.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SPENCER WILLIAMS, District Judge.

I. *Findings of Fact*

A. *Liability*

1. Until November 8, 1968, defendant United Air Lines, Inc. (hereinafter referred to as "United") maintained a policy which required female flight attendants to resign or to suffer discharge upon marriage. That policy did not extend to male flight attendants.

2. Plaintiff Kathleen C. Inda (hereinafter referred to as "Inda") worked for United as a flight cabin attendant from December 29, 1965 until June 15, 1968, at which time she resigned her employment.

3. Inda, at the time of her resignation, wished to continue her employment as a flight cabin attendant with United. However, she had made plans to be married on June 29, 1968, and, in fact, was married on that date. Inda was aware of United's policy of requiring female flight cabin attendants to retire from

that position upon marriage, and her sole reason for resigning was her belief that she was compelled to do so by United.

4. After resigning, Inda worked for United as a clerk, a non-flight position, at United's San Francisco Maintenance Base from August 1968 through August 1969.

5. Inda transferred to said clerk position, for the most part, to maintain her company seniority with United.

6. Plaintiff Kathleen F. Moritz (hereinafter referred to as "Moritz") worked for United as a flight cabin attendant from February 9, 1966 to March 5, 1968, at which time she submitted her resignation.

7. Moritz, at the time of her resignation, wished to continue her employment as a flight cabin attendant with United. However, she had made plans to be married on March 30, 1968, and in fact, was married on said date.

8. Moritz was aware of United's policy of requiring female flight cabin attendants to retire from that position upon marriage, and her sole reason for resigning was her belief that she was compelled to do so by United.

9. On November 7, 1968, by letter of agreement, United entered into a collective bargaining agreement with the Air Line Pilots Association which contained a procedure for the adjustment of grievances and provided in pertinent part:

> ". . . that marriage will not disqualify a Stewardess from continuing in the employ of the Company as a Stewardess . . . ."
>
> "All Stewardesses who have been terminated by the Company because of marriage and have filed a valid grievance protesting such policy, or who have as of this date filed a valid complaint before the Equal Employment Opportunity Commission or State Agencies, will be offered the opportunity to return to active Stewardess service. Such Stewardesses shall make application for reinstatement with no loss of seniority to the Director of Stewardess Service within thirty (30) days of receipt of such notification from the Company of such offer."

10. Insofar as the procedure for the adjustment of grievances precluded the rehiring of former United female flight cabin attendants who, as a result of United's "no-marriage" rule, had resigned before November 7, 1968 and had not previously filed a valid complaint before the Equal Employment Opportunity Commission or State Agencies, United still maintained an employment policy and practice of refusing to hire married women, as opposed to married men, as flight cabin attendants.

11. Upon hearing of the change of policy effected by the letter of agreement of November 7, 1968, Inda sought orally on or about November 7 or 8 of 1968 and in writing on November 14, 1968, to be transferred from her non-flight position and re-employed as a flight cabin attendant.

12. United denied Inda's request to be re-employed as a flight cabin attendant on or about November 18, 1968.

13. On November 18, 1968 Inda filed charges of sex discrimination with the Equal Employment Opportunity Commission.

14. The Equal Employment Opportunity Commission rendered a decision in December 1970, finding that there was probable cause to believe that United had violated Inda's rights on the basis of her sex. On October 16, 1972 the Equal Employment Opportunity Commission furnished Inda a ninety (90) day letter authorizing her to sue in the United States District Court.

15. Inda filed this action on October 18, 1972.

16. On or about November 8 or 9 of 1968, upon learning of United's agreement with the Air Line Pilots Association, Moritz asked Sue Husted, a United stewardess supervisor, for re-employment as a flight cabin attendant. Said request was denied.

17. On or about November 13, 1968 Moritz filed charges of sex discrimination with the Equal Employment Opportunity Commission.

18. The Equal Employment Opportunity Commission rendered a decision in December 1970, finding that there was probable cause to believe that United had violated Moritz's rights on the basis of her sex. On October 16, 1972 the Equal Employment Opportunity Commission furnished Moritz a ninety (90) day letter authorizing her to sue in the United States District Court.

19. Moritz filed this action on October 18, 1972.

20. United's policy of refusing to hire or rehire married women as flight cabin attendants was the only reason Inda and Moritz were denied reinstatement by United; both plaintiffs were otherwise qualified for employment as flight cabin attendants.

B. *Damages: Herein of Earnings and Benefits*

1. From the time of plaintiffs' original employment by United to the time of their resignations, stewardesses employed by United were paid a monthly salary based on 70 hours of flying per month, plus an hourly incentive rate for all hours flown in that month over 70 hours and up to 85 hours.

2. Effective April 1, 1973, the monthly salary for stewardesses was based on 67 hours of flying, and that was reduced to 65 hours of flying effective August 1, 1973.

3. The amount of time flown monthly was largely determined at each flight domicile by the flight schedules awarded to the stewardesses pursuant to monthly bidding.

4. The stewardesses who possessed greater seniority were given preferential treatment in the awarding of flight schedules, and the flights bid for varied in a number of respects, including the amount of time involved, the flight times, and the departure and arrival locations.

5. At the time of their resignations both plaintiffs bid primarily for flights with more time and for the locations that they desired.

6. Both plaintiffs were domiciled at San Francisco at the time of their terminations.

7. During plaintiffs' respective backpay claim periods, the monthly base pay for the minimum required flying hours for stewardesses with the seniority plaintiffs would have enjoyed but for their resignations is as follows:

March 1, 1968	$400.00
October 1, 1968	410.00
January 1, 1969	435.00
October 1, 1969	495.00
January 1, 1970	525.00
October 1, 1970	570.00
January 1, 1971	590.00
October 1, 1971	649.00
January 1, 1972	676.50
January 1, 1973	693.00
October 1, 1973	738.00
January 1, 1974	764.50
May 1, 1974	817.00

8. United's records of yearly earnings for those eight to ten stewardesses who had seniority immediately preceding or subsequent to that which plaintiffs would have had indicate yearly average earnings as follows:

	INDA	MORITZ
1968	$ 6,038	$5,963
1969	6,896	6,599
1970	8,285	7,808
1971	8,633	8,636
1972	9,857	9,980
1973	10,289	9,884

9. United's records indicate that plaintiff Moritz, prior to her termination on March 5, 1968, had earned $1,789.20 in

1968. This sum included December 1967 earnings and thus represented earnings of $131.56 per week. Had Moritz continued to be employed throughout 1968, earning at the same rate, her yearly earnings for 1968 would have been $6,841.12.

10. United's records indicate that plaintiff Inda earned a total of $5,401.39 in 1968 from employment both as a stewardess until June 15, 1968 and as a clerk commencing in August.

11. In order to determine plaintiff Inda's earnings as a stewardess at the time of her termination in 1968, it is necessary to segregate from her total 1968 earnings the remuneration she earned on account of her non-flight clerk position.

12. United's records reflect Inda's total earnings in 1969, solely from her employment as a clerk, of $2,899.38 or $322.15 per month for nine (9) months as her December 1968 earnings were included in the $2,899.38 total.

13. Using this monthly rate of pay for the four months of her non-flight employment in 1968, it is seen that Inda earned $1,288.60 from said employment and $4,112.79 in her capacity as a flight cabin attendant. On a monthly basis Inda earned $587.54 as a flight cabin attendant in 1968. Thus, had Inda continued to be employed as a flight cabin attendant throughout 1968, her total yearly earnings would have been $7,050.48.

14. In addition to salary, United provided a stewardess during the backpay claim periods here involved with the following benefits:

a) free flight passes for herself and her immediate family;

b) substantial allowances for meals, lodging and transportation to and from the airport at layover stations;

c) replacement of all uniforms and insignia due to normal wear and tear or a major style change;

d) accident/sickness, dental and life insurance coverage;

e) effective June 1972, a retirement plan which required no employee contribution.

C. *Damages: Herein of Amounts Earnable Within the Claims Period With Reasonable Diligence*

1. The requirements, perquisites and substance of the stewardess position are amply set forth in John E. Courtright's affidavit filed by plaintiffs herein as Exhibit No. 9. In that affidavit Mr. Courtright, United's Director of In-Flight Services in 1969, characterized the job as a "unique one, different from all others in terms of objectives, qualifications, duties and working conditions." *Sprogis v. United Air Lines, Inc.*, Civil No. 68-C-2311 (N.D.Ill.1974) (Affidavit of J. E. Courtright, ¶ 5).

2. As compared with non-flight jobs, such as maintenance base clerk, the stewardess, among other things, earned approximately twice as much per hour; had a substantial range of choices including where, when, with whom, and how much she would work; could arrange her schedule to allow blocks of time off; enjoyed perquisites such as substantial allowances for meals, free transportation, hotels; and enjoyed the benefits of union representation, seniority rights and the rights to file grievances.

Plaintiff Moritz:

3. In addition to high school, plaintiff Moritz's education included a semester of college at Harris Teachers' College in St. Louis, Missouri.

4. Prior to her employment as a flight cabin attendant with United, plaintiff Moritz had worked in St. Louis for a year as a clerk-typist for the telephone company, and two years as a clerk-typist and relief receptionist for an architectural firm.

5. She left that employment in January of 1966 to become a United stewardess, and worked in that position until March 5, 1968, when she resigned because of United's "no-marriage" rule.

6. From the summer of 1968 through May of 1969 Moritz sought employment as a flight cabin attendant with several airlines including Universal Airlines, World Airways, Trans International Airlines, Air California, Holiday and Flying Tiger. She had also attempted to be rehired by United in November of 1968.

7. All of these attempts were unsuccessful because Moritz was married and the airlines' industry-wide policy prohibited the hiring of married women as flight cabin attendants.

8. From November of 1968 to May of 1969, Moritz was registered with the California Department of Human Resources Development (hereinafter referred to as "HRD"), and collected approximately $1,440.00 in unemployment compensation benefits.

9. Throughout this period HRD referred Moritz to only one job—as a flight cabin attendant with a private charter airline.

10. Moritz accepted this job and worked from approximately May to August, 1969, when said charter airline went bankrupt and the owner-operator disappeared without paying Moritz any of the salary due her.

11. After the annulment of her marriage in May 1970, Moritz, who was then living in the Los Angeles area, again unsuccessfully sought employment as a flight cabin attendant with several airlines including American, Western, TWA and United.

12. Moritz also attempted to find employment in other capacities through an employment agency in Los Angeles. Said agency found her clerical and typing skills too poor to refer her to any such office jobs.

13. Moritz remarried in February of 1971.

14. In September of 1971, Moritz was informed by EEOC that said agency had determined that her charge of sex discrimination against United was well-founded, and said agency would attempt conciliation with United on her behalf.

15. As a result of this notification Moritz was under the mistaken notion that she would shortly be reinstated as a flight cabin attendant with United and therefore ceased pursuing further employment opportunities.

Plaintiff Inda:

16. In addition to her formal high school education, plaintiff Inda attended Nevada Southern University at Las Vegas for nearly two years as a technical theatre major.

17. Prior to her employment as a flight cabin attendant for United, plaintiff Inda worked as a checker for Vegas Village, a large discount house in Las Vegas, Nevada.

18. She left that employment in November 1965, to become a United stewardess, and worked continuously in that capacity until June of 1968 when she submitted her resignation in accordance with United's "no-marriage" rule.

19. After her termination, Inda worked in a ground position with United as a clerk at the San Francisco Maintenance Base from August 1968 through August 1969, at a salary of $322.15 per month.

20. Plaintiff Inda was dissatisfied with this position because it did not allow her a chance to fly, to use any of her qualifications and training in public contact work, or any choice in her hours or amount of work. In addition, the pay was substantially less than the salary Inda had made as a flight cabin attendant.

21. Plaintiff Inda unsuccessfully attempted transfer to another position with United that would utilize her public service training and experience. She was informed that it would take her fifteen years of company seniority for her to become either a hostess in United's Red Carpet Room, a passenger service representative or even to be a ticket agent in United's Redwood City office. Inda resigned her employment as a clerk in August 1969.

22. During the summer of 1969, both prior to and after her resignation of her clerk position, Inda sought employment as a flight cabin attendant with several airlines including Quantas, TWA, American, Pacific, BDAC, Pan American, National, Delta and Air West.

23. All of these attempts were unsuccessful because Inda was married and the airlines industry-wide policy prohibited the hiring of married women as flight cabin attendants.

24. In addition, at Quantas Airlines Inda unsuccessfully attempted to obtain employment as a passenger service representative.

25. Thereafter plaintiff Inda relied on employment advertisements in the newspapers to unearth possible employment which appeared interesting, entailed satisfactory remuneration and afforded her some freedom in choosing her hours of employment. Upon investigating those advertised job opportunities which seemed to offer the desired employment perquisites, Inda discovered that she was either unqualified, that the job did not exist, or she was simply not hired.

26. In September of 1971, Inda was informed by EEOC that said agency had determined that her charge of sex discrimination against United was well-founded, and said agency would attempt conciliation with United on her behalf.

27. As a result of this notification Inda mistakenly felt that she would shortly be reinstated as a flight cabin attendant with United, and therefore ceased pursuing any other substitute employment.

28. Plaintiff Inda's son was born April 10, 1972, and she is at this time nine months pregnant.

II. *Conclusions of Law*

A. *As to Liability*

1. This Court has jurisdiction over the parties and the subject matter hereof.

2. The rule, regulation or policy of United which required female flight attendants to resign or to suffer discharge upon marriage is unlawful as in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

3. United's modification of its "no-marriage" policy (said policy having been referred to in paragraph 2 of Conclusions of Law, *supra*) by letter of agreement dated November 7, 1968 between United and the Air Line Pilots Association carried forward the consequences of United's past discriminatory policies. Application of this modified "no-marriage" policy still denied plaintiffs employment or reinstatement as flight cabin attendants solely because they were female and married, and was thus discriminatory and in violation of 42 U.S.C. § 2000e *et seq.*

4. The resignations of Inda and Moritz, and each of them, were caused by United's discriminatory policies, and thus the result of unfair employment practices in violation of 42 U.S.C. § 2000e *et seq.*

5. The discharge violations found in paragraph 4, *supra,* had continuing discriminatory effects, and each day that plaintiffs remained unemployed by United thereafter constituted a day in which United violated 42 U.S.C. § 2000e *et seq.* as to each plaintiff.

6. United's refusal to rehire Inda on November 18, 1968, constituted an act of discrimination in violation of 42 U.S.C. § 2000e, *et seq.*

7. United's refusal to rehire Moritz on November 8 or 9, and again on November 14, constituted acts of discrimination in violation of 42 U.S.C. § 2000e *et seq.*

8. Plaintiffs Inda and Moritz have sustained their burdens of proof by establishing that the preponderance of evidence shows:

a) their original resignations from United as flight cabin attendants were substantially caused by United's discriminatory "no-marriage" policy; and

b) United's refusal to rehire or reinstate plaintiffs in November 1968 was motivated solely by an illegal and discriminatory policy in violation of 42 U.S.C. § 2000e *et seq.*

9. Inda filed sex discrimination charges with the Equal Employment Opportunity Commission within 90 days subsequent to acts of discrimination against her by United.

10. Moritz filed sex discrimination charges with the Equal Employment Opportunity Commission within 90 days subsequent to acts of discrimination against her by United.

B. *As to Damages*

11. In order to effectuate the purposes underlying Title VII of the Civil Rights Act, back pay is properly awarded to an aggrieved person found to have been discriminated against in violation of said Title. An award of back pay has been recognized as not a "mere adjunct of some more basic equity" but as an "integral part of the whole relief which seeks, not to punish the [defendant] but to compensate the victim of discrimination." *Pettway v. American Cast Iron Co.*, 494 F.2d 211, 252 (5th Cir. 1974).

12. The amount of damages permissibly awarded here is controlled by Section 706(g) of the Civil Rights Act, 42 U.S.C. § 2000e-5(g), which provides in part:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin . . such . . . practice, and order such affirmative action as may be appropriate, which may include . . reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."

13. Since this Court has determined that plaintiffs have sustained economic loss from defendant's discriminatory employment practices, back pay should be awarded unless special circumstances are demonstrated. No special circumstances are present here. *Pettway, supra,* at 252-53.

14. Plaintiff Inda's back pay claim period commenced on June 15, 1968 and, save her two pregnancies, continues uninterrupted until she is reinstated under the terms and conditions of this order. Plaintiff Moritz's back pay claim period began on March 5, 1968 and likewise continues until she is reinstated in accordance with this order.

15. Although counsel for plaintiff Inda intimated that Inda's two pregnancies probably would not have occurred had she been employed as a flight cabin attendant at the time, no testimony was elicited to corroborate such a conclusion.

16. In any event, the facts are that Inda did become pregnant, that her pregnancies were voluntarily planned and not just accidents or casual illnesses, and that her pregnancies would have rendered her unavailable for service as an airline stewardess at some point even if the opportunity to work had been open to her.

17. Hence, it is the opinion of this Court that Inda's claim period referred to in paragraph 14, supra, was interrupted by her two pregnancies for the number of months specified in plaintiffs' trial exhibit number 11, *to wit,* 8.3 months for Inda's first pregnancy and, to the extent that the damages provided for in this order seek to make Inda whole through December 1974, 5.3 months for her second pregnancy. In short, United is entitled to a reduction in its back pay liability by reason of Inda's two pregnancies.

18. Title VII provides that, "Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U.S.C. § 2000e-5(g).

19. This "mitigation" provision is in accord with and is interpreted in light of the common law measures of damages for breach of contract of employment and the practice under the National Labor Relations Act. *Ochoa v. American Oil Co.*, 338 F.Supp. 914, 919 (S.D.Tex.1972); *Pettway, supra,* at 252.

20. The burden is on defendant United to show interim earnings or amounts earnable with reasonable diligence by plain-

tiffs. *Hegler v. Board of Educ.*, 447 F.2d 1078, 1081 (8th Cir. 1971); *Rolfe v. County Bd. of Educ.*, 391 F.2d 77, 81 (6th Cir. 1968); *N.L.R.B. v. Madison Courier, Inc.*, 153 U.S. App.D.C. 232, 472 F.2d 1307, 1318 (1972).

21. Defendant, contending that it does not carry the burden but that the burden rests on plaintiffs, made little or no effort to meet it. Plaintiffs, although asserting that the burden was defendant's, made an adequate showing that plaintiffs used reasonable diligence to find other suitable, similar or substantially similar employment.

22. Defendant argued that Inda's and Moritz's applications to other airlines for employment as flight cabin attendants did not evince conduct reasonably calculated to procure other employment since they knew of the industry-wide proscription against hiring married stewardesses. This is a most specious contention. To subscribe to defendant's argument would be in effect condoning not only isolated employment discrimination by individual employers, but wholesale discrimination on an industry-wide basis. In essence, defendant would have this Court permit discriminating employers to escape full Title VII liability by merely pointing to the fact that substantially similar employment could never be found since all employers in the same field followed the identical discriminatory practices. This Court will not countenance such a result, for no person should be allowed to profit from his or her wrong merely because he or she happens to share in its perpetration.

23. Apart from the matter of available stewardess jobs at other airlines, defendant contends that plaintiffs made inadequate efforts to find employment in the San Francisco area.

24. As was noted above (paragraph 20), it has long been well established that in damage claims for what was here, in effect, a wrongful discharge, the burden is upon the employer to show that the employees did not act reasonably to procure other employment.

25. Although plaintiffs' efforts in seeking substitute similar employment cannot be characterized as overwhelming, there is substantial evidence in the record showing that they did pursue other employment and did so in a reasonably diligent fashion.

26. This Court concludes that defendant United has failed to show that there were substantially similar jobs available to plaintiffs Moritz and Inda which they could have discovered and for which they were qualified.

27. Plaintiffs Moritz and Inda have shown that they exercised reasonable diligence to find substantially similar employment during the back pay claim period, but that no such employment was available to them.

28. State unemployment compensation benefits are made to carry out an independent social policy and are, therefore, not to be considered "interim earnings" deductible from a discriminatee's back pay award. *Tidwell v. American Oil Co.*, 332 F.Supp. 424, 437-38 (D.Utah 1971.) As such, the $1,440.00 in unemployment compensation benefits received by plaintiff Moritz are not to be deducted from her back pay award.

29. Therefore, pursuant to 42 U.S.C. § 2000e-5(g), United is liable to plaintiffs Moritz and Inda for the following amounts of back pay damages:

	INDA	MORITZ
1968	$ 1,649	$ 5,052
1969	3,997	6,599
1970	8,285	7,808
1971	8,633	8,636
1972	9,857	9,980
1973	10,289	9,884
1974	10,289	9,884
less (1971-72 maternity)	−6,538	
less (1974 maternity)	−4,544	
TOTALS	$41,917	$57,843

30. United is liable to plaintiffs for pre-judgment interest on the above back pay awards, at the rate of 6% per annum, to be calculated on a quarterly earnings basis.

31. United is further liable to plaintiffs for back pay in 1975 until such time as they are reinstated pursuant to this Court's order.

32. United is ordered to reinstate plaintiffs with full seniority from their respective dates of hire, with all of the employment rights and benefits to which they are entitled by virtue of said seniority, including restoration into United's retirement plan.

33. Jurisdiction is retained to determine the amount of attorney's fees and costs incurred in prosecuting this action.

It is so ordered.

Supreme Court, U. S.
FILED
MAR 21 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1182

UNITED AIRLINES, INC.,
Petitioner,

vs.

KATHLEEN C. INDA,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The judgment petitioner seeks reviewed was entered by the United States Court of Appeals for the Ninth Circuit and that opinion is reported as *Inda v. United Air Lines, Inc.*, 565 F.2d 554 (9th Cir. 1977) and attached as Appendix A to the petition (hereinafter "App. A").

The opinion of the District Court is reported at 405 F.Supp. 426 (N.D. Cal. 1975) and attached as Appendix B to the petition (hereinafter "App. B").

JURISDICTION

Petitioner claims jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is it necessary on the facts of this case to invoke the certiorari powers of this Court to provide further guidance on the 1972 Title VII amended filing period in light of *Electrical Workers v. Robbins and Meyers, Inc.*, 429 U.S. 229?

STATUTES INVOLVED

Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 241, 260, 42 U.S.C. § 2000e-5(d), provided in part:

> "A charge . . . shall be filed within ninety days after the alleged unlawful employment practice occurred . . ."

That provision was amended and renumbered as Section 706(e) by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, 42 U.S.C. § 2000e-5(e), and states as follows:

> "A charge under this section shall be filed within one hundred and eighty days after the alleged unemployment practice occurred . . ."

Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113, provides:

> "The amendment made by this Act to Section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter."

STATEMENT OF THE CASE

Respondent Kathleen C. Inda was a stewardess employed by petitioner United Air Lines, Inc. (hereinafter "United") until June 15, 1968 when she was forced to resign because of United's no-marriage rule. That rule required female, but not male, flight cabin attendants to be single and to resign immediately or be fired upon marriage.

Pursuant to this policy both Inda and her co-plaintiff below, Kathleen F. Moritz,[1] were advised by United supervisors to resign rather than force the company to fire them. The supervisors told them that if they resigned in compliance with the rule and it were ever abandoned, they would have preference in being re-employed as United stewardesses. If, however, Inda and Moritz forced the company to fire them, they would be ineligible for rehire in any position (Reporter's Transcript of December 17, 1974, hereinafter "RT" 6:6-21; 22:9-21; 36:1-8, and 13-16; 41:1-11; see also App. A, p. 3).

Both Inda and Moritz resigned in reliance upon these representations, and neither filed a discrimina-

[1]Kathleen F. Moritz resigned because of the no-marriage rule in March, 1968. Although the petition herein is limited to Inda, the Moritz decision is pertinent in as much as the representations and determined reliance involved therein were the same for both Inda and Moritz.

tion charge with the Equal Employment Opportunity Commission (hereinafter "EEOC"). Only those stewardesses who were actually fired because of marriage could file a union grievance under the terms of the collective bargaining agreement between United and the Air Line Pilots Association (hereinafter "ALPA"). Those who resigned in compliance with the rule could not grieve the policy (RT 13:18-21).

On November 7, 1968 United modified its no-marriage rule to permit stewardesses to continue in their jobs after marriage. Women were still required to be single to be hired initially for that job, however. Some former stewardesses—those who had been dishonest with the company and had been fired when their marriages were discovered—were given the opportunity to return to their jobs with no loss in seniority, but the new policy did not reinstate those stewardesses who had complied with company policy by openly disclosing their marriage plans and resigning.[2]

[2]The November 7, 1968 letter of agreement between United and the Air Line Pilots Association stated as follows:

"The company agrees that marriage will not disqualify a Stewardess from continuing in the employ of the Company as a Stewardess. . .

"All Stewardesses who have been terminated by the Company because of marriage and have filed a valid grievance protesting such policy, or who have filed as of this date a valid complaint before the Equal Employment Opportunity Commission or State Agencies, will be offered the opportunity to return to active Stewardess service. Such Stewardesses shall make application for reinstatement *with no loss of seniority* to the Director of Stewardess Service within thirty (30) days of receipt of such notification from the Company of such offer." (emphasis added)

App. B, pp. 18-19, Finding No. 9.

Within a week of the change in policy, both Inda and Moritz attempted to be rehired as United stewardesses. They sought and were refused even new-hire status because they were married (RT 8:25-10:11; 24:5-25:15; 32:6-33:5). Both immediately filed charges of sex discrimination with the EEOC. Inda's charge was filed on November 18, 1968, 156 days after her forced resignation.

The EEOC investigated the charges and in December, 1970 determined that the charges were probably true (App. B, pp. 19-20, Findings Nos. 14 and 18). In September of 1971 both Inda and Moritz were informed of that determination and of the Commission's intent to conciliate on their behalf (App. B, pp. 24 and 26, Findings Nos. 14 and 26). Conciliation failing, the EEOC notified them of their right to sue on October 16, 1972 and two days later this suit was filed alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

United's motion to dismiss the complaint because of untimely EEOC charges was denied and trial resulted in a judgment in favor of both plaintiffs on January 30, 1975. See App. B.

Appeal was taken to the Ninth Circuit which issued its opinion on November 28, 1977. See App. A. Inda's judgment was affirmed in its entirety. The Ninth Circuit held that Section 14 of the Equal Employment Opportunity Act of 1972 (hereinafter "1972 Act") made that Act's 180-day time period applicable to Inda's EEOC charge which was still pending with the Commission when Congress passed the Act.

Although Moritz's EEOC charge was also still pending on the date of enactment, she had not filed it within 180 days of her forced resignation. It was, however, filed within six days of United's refusal to re-employ her, which was held to be a separate discriminatory act. Both Moritz and Inda had resigned rather than be fired because of United's assurance of rehire preference if the no-marriage rule were abandoned. Since the exact opposite occurred, the Ninth Circuit stated:

> Under these circumstances equitable principles analogous to those of estoppel demand that United honor representations relied upon by plaintiffs to their detriment. Failure to do so renders the denial of re-employment an independent breach of duty, sharing with the original termination its nature as a discrimination on the basis of sex and thus a violation of the Act, as to which violation the EEOC charges were timely filed by Moritz.
>
> 565 F.2d at 562 (App. A, p. 13).

Moritz's judgment was ordered modified to reflect the November 1968 violation rather than the earlier date of forced resignation.

REASONS FOR DENYING CERTIORARI

1. THE NINTH CIRCUIT PROPERLY APPLIED THE 180-DAY PERIOD TO INDA'S EEOC CHARGE

The sole question urged herein for review was explicitly left unanswered by this Court in *Electrical Workers v. Robbins and Meyers, Inc.*, 429 U.S. 229,

243 n.17.[3] Resolution was not necessary to the disposition of that case. That opinion's careful analysis of the Congressional intent evidenced in the legislative history of the 1972 Act has, however, properly guided the few lower courts subsequently facing the issue.

Three such cases have arisen: the decision below; *Dickerson v. U.S. Steel Corp.*, 439 F.Supp. 55, 69, n.11 (E.D. Pa. 1977); and *Crook v. Penn Central Transportation Co.*, 427 F.Supp. 956 (N.D. Ill. 1977). All three decisions are in agreement. As stated by the court in *Crook, supra,* 427 F.Supp. at 959:

> "That the Court limited its holding to the facts before it is understandable. In our judgment, however, the Court's logic can be extended to cases such as the one at bar, where the charge was filed within 180 days of the alleged discriminatory event and was 'pending' before the Commission on March 24, 1972 even though the charge did not allege a discriminatory occurrence within 180 days of March 24, 1972. To find otherwise would place too much emphasis upon the fortuity of the timing of an alleged discriminatory practice rather than the specifically stated Congressional desire to extend the 180 day period to 'charges pending before the Commission on the date of the enactment of (the) Act.' Accordingly, we hold that plaintiff's charge . . . was timely."

---

[3]That footnote reads as follows:

"Accordingly, we need not decide whether the enlarged limitations period also redounds to the benefit of persons who filed a charge more than 90, but less than 180, days from the date of the alleged "occurrence," where the 180 days had run prior to March 24, 1972."

The legislative history of the 1972 Act completely supports these decisions. The initial versions of the bills introduced in both the House and Senate provided that any amendments to Title VII would not apply to charges filed with the EEOC prior to the effective date of the Act.[4] Section 14 originated in an amendment by Senator Javits whose floor remarks indicated the broad reach of its intended effect: "this amendment would make whatever we do enact into law applicable to pending cases." 118 Cong. Rec. 4816 (1972).[5]

No legislative history supports a limitation on the plain language of Section 14. Nevertheless, United argues that this Court's decision in *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977) precludes the application of the 1972 Act as intended by Congress.

Carolyn Evans was also forced to resign her job as a United stewardess because of the no-marriage rule. She resigned in February of 1968 but did not file an EEOC charge until five years later. She was new-hired in 1972 and in February of 1973 complained to the EEOC of United's refusal to credit her with the pre-1972 stewardess seniority she would have had if she had not been forced to resign.

Respondent submits that the *Evans* case is simply inapposite to the question United has raised for review herein. Evans had no charge pending with the EEOC when the 1972 Act was passed, and when she

[4]See H.R. 1746, 92nd Cong., 1st Sess. § 10 (1971); S. 2515, 92nd Cong., 1st Sess. § 13 (1971); H.R. Rep. No. 238, 92 Cong., 1st Sess. 32 (1971).

[5]Rep. No. 415, 92nd Cong., 1st Sess., 46, 72 (1971).

subsequently filed her charge considerably more than 180 days had elapsed since her forced resignation. She alleged no detrimental reliance on representations of hiring preferment which might have made the refusals of reinstatement independent violations of Title VII, and the 1973 charge was too late to challenge those refusals even had she so alleged.

United totally ignores the factual differences between Carolyn Evans and Kathleen Inda just as it ignores the factual similarities between Inda and Moritz and the Ninth Circuit's holding in Moritz, which it does not challenge (Petition, p. 3). Inda, along with Moritz, relied to her detriment on United's representations of preferential rehiring of stewardesses who resigned in compliance with company policy rather than be fired. United's failure to honor those representations when it changed its policy in November of 1968 thus constituted a separate violation of Inda's rights under Title VII. The EEOC charge filed by her within several days thereafter was clearly timely as to that Act and all but five months of the back-pay liability, of which United complains, occurred after that date.

---

2. RESOLUTION OF THE QUESTION URGED FOR REVIEW BY THIS COURT IS UNNECESSARY

Inda was entitled to favored rehire treatment under the November 1968 change in policy. The exact opposite occurred: United re-employed only those stewardesses who had concealed their marriages and had been

fired upon discovery. Had Inda not followed the advice of her supervisors she would still be a United stewardess. If United had discovered her marriage and fired her she would have been eligible to file a union grievance, an option not available to those who complied with the rule and resigned. Had Inda filed such a grievance, she would have been reinstated with full seniority pursuant to the November 7, 1968 agreement. Had her five-month old marriage escaped discovery, that agreement would have also automatically entitled her to continue in her job.

Thus, whether or not this Court finds the 1972 Act's 180-day time period applicable to the earlier forced resignation, Inda is entitled to reinstatement by United and back-pay as of the date United wrongfully refused to re-employ her on November 18, 1968 (App. B, p. 19, Findings Nos. 11 and 12). Since United rehired the fired stewardesses "with no loss of seniority",[6] Inda's right to re-employment as of that date should also carry full seniority if the promise of favored rehire treatment is to be fulfilled.

The maximum benefit of this Court's efforts on review would be to reduce United's back-pay liability to Inda by $1,248.00.[7] Surely this Court's strained resources can be better spent.

[6]Had she been reinstated on November 18, 1968 Inda would have worked as a stewardess for the remaining 6½ weeks of 1968 and should have earned $838.00. In fact, she earned $487.00 during those weeks in her job as a clerk. United would thus be liable to Inda for at least $401.00 in 1968 back pay. (Computations based on Findings Nos. 10-13 at p. 3 of App. B.)

[7]See also the Section-by-Section analysis of the bill as reported from conference committee and considered by both Houses prior to their voting, which stated "that the amended provisions of Section 706 would apply to charges filed with the Commission prior to the effective date of this Act." 118 Cong. Rec. 7169, 7567 (1972), and that the limitation period should be construed "so as to give the aggrieved person the maximum benefit of the law." *Id.* at 7167, 7565.

It is most unlikely that the application of the 1972 Act's 180-day time period to EEOC charges filed prior to the passage of the Act will pose problems in future Title VII cases. Five years have now passed since its enactment and charges then pending with the Commission have in all probability been either successfully conciliated or litigated. Should the question arise, this Court has already given the lower courts ample guidance in *Electrical Workers, supra.* The decisions below since then have been in complete uniformity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated, March 20, 1978.

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Supreme Court, U. S.
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Reply Brief of Petitioner United Air Lines, Inc. in Support of its Petition for Writ of Certiorari

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Reply Brief of Petitioner United Air Lines, Inc. in Support of its Petition for Writ of Certiorari

This brief is submitted in reply to respondent's opposition to our petition for writ of certiorari. We have but two points.

I.

In examining the question raised in our petition, there are necessarily two issues upon which this Court should focus. The first is on the intent of Congress in enacting Section 14 of the Equal Employment Opportunity Act of 1972. The second focus is on the constitutionality of retroactive legislation.

That is to say, if this Court determines that Congress *intended* the 180 day limitation period to apply retroactively to all charges of discrimination still before the Commission on March 24, 1972,

regardless of how distant in time they were filed, then the critical question of whether the Constitution permits such retroactive legislation must be resolved.

The decision of the Ninth Circuit has sanctioned the right of Congress to enact retroactively legislation rendering unlawful that which occurred more than three years prior to the legislation—that which was "lawful" and had "no present legal consequences" for more than three years. *United Air Lines v. Evans,* 431 U.S. 553, 558 (1977). We submit that the Due Process Clause of the Fifth Amendment stands as a bar to any such retroactive legislation by Congress. *William Danzer & Co. v. Gulf & Ship Island R. Co.,* 268 U.S. 633 (1924).

Respondent's brief in opposition is silent on this important constitutional issue.

II.

Respondent asserts in opposition to the petition that the decision of this Court on the question presented is "unnecessary." Respondent has also asserted in her opposition at page 10 that:

> "The maximum benefit of this Court's efforts on review would be to reduce United's back-pay liability to Inda by $1,248.00. [Footnote omitted] Surely this Court's strained resources can be better spent."

We know of no decision of this Court or any relevant principle which conditions relief by this Court upon the amount at issue. If the question presented is of general significance, as we urge that it is, the amount involved in a particular case is of no moment. Moreover, in addition to the necessary adjustment in back pay, Inda's seniority would also have to be adjusted by at least 2½ years. As to co-plaintiff Moritz's seniority, the Ninth Circuit left no doubt:

> ". . . judgment in favor of Moritz is vacated and the matter remanded with instructions to modify the award of back pay to run from November 14, 1968, and to adjust seniority to conform with re-employment as of that date." (Appendix A, p. 16 to the Petition.)

We submit that such an adjustment in seniority as well as back pay is no less significant than the adjustments this Court made in Carolyn Evans' seniority last term. Accordingly, we respectfully pray that the petition be granted.

Dated: San Francisco, California, March 28, 1978.

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